85-893

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO.

LARRY H. HUNT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PAUL J. WELSH, II, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Whether the petitioners, Larry Hunt and Paul J. Welsh II, were denied a fair trial by the government's use of similar acts evidence as rebuttal to opening statement, by the suggestion to the jury that defense counsel was a collaborator in a similar act, by statements suggesting that the government had additional evidence of guilt which it had not introduced, and by the government attorneys voucher of credibility.

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OPINIONS BELOW

The complete opinion of the United States Court of Appeals for the Fourth Circuit is printed in Appendix I to this petition and is unpublished. The denial of rehearing is printed in Appendix II.

JURISDICTION

Petitioners (defendants) seek review of judgment of the United States Court of Appeals for the Fourth Circuit affirming their convictions on charges under 18 U.S.C. § 371, 18 U.S.C. § 1343 and 2, and 18 U.S.C. §2314 and 2. Review in this case is sought by Petition for Certiorari upon a judgment of that court filed on August 14, 1985, and the denial on September 12, 1985, of a timely motion for rehearing.

STATUTES

This case involves the following statutes:

18 U.S.C. §2:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1343:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §2314

Whoever transports in interest or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more,

knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be

> used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof--
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

STATEMENT OF CASE

A. Introduction

The petitioners were convicted, after a lengthy trial and five days of jury deliberation, on a thirteen count indictment alleging a single scheme to defraud $1.86 million from an Ohio limited partnership named Ranger Mining

Associates, Ltd., (hereinafter referred to as "Ranger.") Ranger was organized as a tax shelter under 1976 tax laws, which afforded generous tax savings to coal mine investors by allowing them to deduct advance royalties paid by the partnership in the form of a partial cash payment and a substantially larger non-recourse note. Investors in the highest tax brackets were, thus, able to reduce their tax liabilities by an amount greater than the cost of their partnership units.

Ranger was organized to own and produce an estimated 7 million tons of coal at sites which were leased at the time of the investment, or which would be leased later as discovered. The coal was to be mined, shipped and sold by a contract miner, the defendant Midwest Consolidated Coal Company, Inc., (hereinafter referred to as "Midwest").

Midwest was a corporation formed in 1976 by the petitioners, Hunt and Welsh, along with a third defendant Jack Cline,[1] and had offices in Columbus, Ohio and Chapmanville, Logan County, West Virginia.

Defendant Hunt, who had prior coal mining experience, was to purchase coal leases for Midwest representing 7 million tons of recoverable coal and to document this tonnage with engineering reports estimating the amount of coal reserves under each lease. Midwest was then to assign its leases to Ranger and would be paid an advance royalty for coal to be mined by Midwest. This advance payment would include a cash sum of $1.86 million and a nonrecourse promissory note, in the amount of $5.58 million, which was

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[1]Cline was not convicted on any of the charges against him, and therefore was not a party to the appeal.

collectible from Ranger only to the extent that Midwest successfully mined coal which produced income to Ranger.

The transaction was known by all participants to be highly speculative. The government, however, contended the transaction was a sham from beginning to end, and that the defendants never intended to mine any coal.

B. Negotiation Period: August to December 31, 1976

The transaction began in August, 1976, when Jack Cline introduced Welsh to Marvin Kelner, an investment dealer from Cleveland, Ohio. In October, Kelner and an associate William Proper traveled to Midwest's Grassy Creek mine in Logan County, West Virginia where Midwest had been mining for about 5 months. This mine was producing 800 tons of coal per day, when operating, and had been making

money until November, 1976 when the amount of rock in the coal seam increased to over 50% resulting in a high percentage of reject by the purchaser. On October 26, 1976, Midwest executed contracts to assign its coal leases to Ranger and to mine its coal. These contracts were executed just in time to avoid a new IRS rule limiting the tax advantages of the proposed transaction.

The mining contract required Midwest to mine at least 50,000 tons of coal at $21.00 per ton in 1977. Midwest was also to provide, before closing, a report estimating 7 million tons of coal reserves on Ranger leases. Hunt employed a well-known engineering firm, Gaddy Engineering Company of Huntington, West Virginia, to prepare the report.

In November and December, 1976, securities offering statements were prepared and investors were solicited. According to the government's evidence, Hunt, Welsh and others encouraged investments in the Ranger transaction during this period, and Hunt gave the impression that he was very wealthy and successful at coal mining. The transaction was attractive to investors; optimism for the new project ran high at Midwest. In November, and thereafter, however, Midwest was struggling to pay its bills. Norris, who managed the Grassy Creek mine, testified that this was due to many unnecessary and costly improvements and repairs.

In late November, in Boston, Massachusetts, Midwest closed a coal venture transaction with Chilton Coal Properties, Ltd. This syndication

involved a $1.6 million cash payment to Midwest, most of which was used to pay creditors of Midwest at the Grassy Creek mine.

Closing on the Ranger transaction had to be complete before the end of 1976 in order to obtain the tax benefits. Before closing, Hunt and Midwest provided Ranger with financial statements prepared in the office of Midwest's attorney, James Bownas. The government attempted to show that these statements puffed their net worths.

In late December, 1976, a preliminary coal reserves report was issued estimating 10.486 million tons of recoverable coal, 6.202 million tons of which were designated as "proved" and 4.284 million tons as "probable." Some of the properties covered by the report were not under lease to Midwest. Ranger,

after consultation with its expert, William Renton, did not consider the reported reserves to be sufficient to guarantee 7 million tons of economically mineable coal; accordingly, Midwest was required to provide additional coal leases. A lease for a tract at Cox's Fork, West Virginia, known as the Castanoli lease, was provided at closing. Midwest was to commence development of a mine at this location for Ranger in 1977.

The closing took place on December 31, 1976, and lasted most of that day. At closing Ranger demanded that one half of its advance payment to Midwest be deposited in a special Midwest account requiring checks to be co-signed by Ranger. This was a considerable increase from the previously agreed reserve amount of $300,000.00, which Midwest reluctantly accepted. Because Ranger had sold fewer

partnership units than expected, Midwest's total cash received at closing was further reduced by almost 10% from $2.1 to $1.86 million.

Once the Ranger closing was completed, Hunt, Welsh and Bownas flew to an airport in Michigan for 45 minutes where they closed a coal mine venture with another limited partnership known as Antares IV, Ltd. This transaction was completed on the return flight with attorney Donald Eacret serving as the general partner of Antares. Eacret later served as Hunt's trial counsel in this case.

With the Ranger and Antares closings, Midwest had 3 coal mine ventures underway. In January, Hunt, Welsh, and Cline took vacations.

C. Coal Mine Development
Period: January to November, 1977

From January to November, 1977, Midwest worked under its contract with Ranger. During this period, a substantial amount of money was released from the special account at Midwest's request. In January, $50,000 was released from the account to pay for the coal reserves report by Gaddy Engineering. In March and February, another $293,000 was released. A dock loading and storage facility was planned for shipment of coal to a large utility company under a contract being negotiated by Hunt, for which Ranger and Midwest agreed to release $200,000, but the dock was never put into use. At two different times, equipment purchases were agreed to, and the sums of $93,000 and $87,000 were released. This equipment was used

at the Grassy Creek mine, and, the government's evidence tended to show that much of the remaining money was used for purposes other than development of the Ranger mine.

In May, Midwest organized a coal mine venture, known as Hilltop, Ltd., for a lease referred to at trial as the Marcum lease. Prior to organization, Midwest's attorney Bownas had advised Hunt and Welsh that they could not develop this lease independently, to the exclusion of Midwest and Cline, without being subjected to liability for using a corporate opportunity for individual gain.

In June, 1977, Midwest secured approval for release of $100,000 to meet its payroll for some 65 employees. Net payroll was paid to Midwest's employees,

but withholding deductions, in the sum of $23,600, were not paid. Later that month the Grassy Creek mine was closed.

Development of the Castanoli site was slow. Two houses had to be purchased and moved. A road was to be constructed to the site. Excavation for the mine was commenced while Midwest's creditors were being put off with statements to the effect that "the check is in the mail." In late September, 1977, $43,900 was released to pay Clark Coal Company to finish excavation of the Ranger mine on the Castanoli tract. A check for the full cost of excavation was sent to Irvin Clark with instructions to return $22,000 to Midwest. Hunt contended this $22,000 was for work yet to be performed, but it was deposited to an account held for the Hilltop coal mine venture.

In early October, $67,000 was released to Midwest for general operating expenses on condition that mining be commenced by November, 1977 or all funds remaining in the special account could be withdrawn by Ranger. Ranger also was to be provided additional coal properties and it took back $110,000 from the account as security for this agreement.

By mid-November, Midwest had not opened the Castanoli mine. Ranger declared a breach of contract. Midwest's offices in Chapmanville, West Virginia were closed.

From December, 1977 to January, 1978, $72,000 was taken from the special account without Ranger's approval. Thereafter, the remainder of the special account funds was levied by the Internal Revenue Service for back taxes.

D. Trial of Case

In opening argument, the government contended that its evidence was sufficient to prove the foregoing facts and to show that the defendants acted with intent to defraud Ranger and to commit conspiracy. Initially, the government relied upon proof of misrepresentations about the financial standing of Hunt and Midwest, the amount of leased coal assigned to Ranger, and the use of Midwest's funds which were released from the special account. After the testimony of the government's key witnesses Kelner and Silverberg, who together controlled Ranger with the consultation of their experts Renton and Myron Kok, the government found its case substantially weakened, and shifted its case to proof of similar acts. Kelner's testimony discounted the government's

theory that misrepresentations were made about the number of coal leases Midwest would provide to Ranger. The evidence concerning the financial standing of Hunt and Midwest was also inconclusive. The use of the special account funds was undisputed, but it was arguably due to mismanagement, and did not inure to defendants. Proof of similar acts thus became the focal point of the government's case as the trial progressed.

Prior to trial, the government had disclaimed an intent to use similar acts in its case in chief. The government later acknowledged, however, that it was offering to prove similar acts, despite its failure to identify them in discovery, based on the contention that

counsel for Welsh had opened the issue by a reference to "mistakes" by the defendants.

The government showed that Hunt's trial counsel, Donald Eacret was involved in Antares, one of the similar acts. It was also brought out that Eacret was recently on a business trip to New Orleans with Norris, a key government witness who revised much of the spirit of his grand jury testimony on direct examination by the government. By objections and in closing arguments, government counsel sought to taint all the defendants and their counsel with the acts of Hunt's counsel.

At the conclusion of the case, the government was twice permitted to interrupt the sequence of argument. The first instance occurred when the Court allowed the Acting United States

Attorney, Wayne Rich, to explain, in the middle of attorney Eacret's argument, that the government had not produced a witness to testify about Hunt's alleged misconduct in another transaction known as Red Jacket. The second occurred when attorney Rich informed the jury upon his oath of office, that the defendants had been fairly prosecuted. The case was very close. Jury deliberations took almost five days. Two Allen charges were given. The verdict was incomplete and inconsistent.

ARGUMENT

DEFENDANTS WERE DENIED THEIR RIGHT TO A FAIR TRIAL BY THE GOVERNMENT'S IMPROPER USE OF SIMILAR ACTS EVIDENCE, INCLUDING IMPLICATION OF DEFENSE COUNSEL AS A COLLABORATOR, BY IMPROPER STATEMENTS SUGGESTING THAT THE GOVERNMENT HAD ADDITIONAL

EVIDENCE OF GUILT WHICH IT HAD NOT INTRODUCED, AND BY THE GOVERNMENT ATTORNEY'S VOUCHER OF CREDIBILITY.

The petition for certiorari is based on a series of transactions, petitioners believe deprived them of the fair trial guaranteed to them by the constitution. They are (A) the government was improperly allowed to introduce evidence of similar acts in its case in chief after disclaiming an intent to use such evidence, and referred to defense attorney Donald Eacret as a collaborator in one of these similar acts; (B) the statements by the court and the government suggesting that that Donald Eacret would have been a witness for the government had he not been representing defendant Hunt, and informing the jury in closing argument that the Government had another witness who would have testified

that Hunt had committed additional acts of dishonesty were improper references to matters not supported by the record and deprived the defendants of an opportunity to confront their accusers; and (C) the government attorney's voucher of his own credibility was both unethical and prejudicial.

A. Introduction of Similar Act Evidence

The gist of the governments case was that the defendants had participated in a multifaceted scheme to defraud Ranger Mining Associates, Ltd. of $1.86 million in advance royalties for coal that would never be mined. The government, prior to trial, repeatedly disclaimed any intention of using similar act evidence to prove this crime. (App. p. 511-517[2]).

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[2]References designated ("App. p. ___") are to the trial transcript as paginated in the Appendix filed in the Fourth Circuit.

At trial, however, the government was allowed to introduce similar act testimony of three syndications--Hilltop Ltd., Chilton Coal Properties, Ltd., and Antares IV. Ltd.

As to the first, the evidence was presented during the testimony of an investor, Dr. Bernard Master. The government, responding to the defendant's relevancy objection, insisted that the subsequent syndications known as Hilltop and L.H. Hunt Enterprises were admissible as similar acts, introduced in its case in chief to rebut assertions made in opening statements by defense counsel that Ranger had failed because of bad weather, strikes, and similar unfavorable conditions. (App. p. 507-511). The government conceded that it had not given notice of intent to use similar act evidence; it asserted, however, that at

the time of discovery it did not intend to use such evidence. Apparently adopting the view that the matter had been opened up by the opening statements of counsel, the court admitted the Hilltop testimony. (App. p. 516-17).

On appeal, the Fourth Circuit apparently agreed with the defendants' contention that the government did not have a sufficient basis for introducing similar act evidence, noting that "[u]nder United States v. Hadaway, 681 F.2d 214 (4th Cir. 1982) the opening statement of counsel probably was an insufficient basis, standing alone, for such rebuttal", but held that the court's instruction cured any error. Appendix I at 8-9 n.3. This analysis was defective for two reasons. First, the appeals court failed to address the question of Antares, which it found to have been

similar act evidence, despite the government's initial protestations that it was not. Id. n.2.[3] At trial, the court specifically declined to give a "similar act instruction" (App. p. 440-41), and therefore there was no cure of this error.

The Fourth Circuit's rationale was also defective because the limiting instruction does not cure the prejudice resulting from the introduction of similar acts in the government's case in chief, where the government had specifically disclaimed an intent to rely on them. The defendants certainly had a right to know the charges against them so that they could prepare for trial, and it was improper for the government to mislead them about a matter that would be

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[3]In its appellate Brief, the government conceded, at pp. 26, 30, that Antares was introduced as a similar act.

so critical to the case. Other Federal appeals courts have reversed convictions on the fact that evidence of other wrongdoing was not presented in a manner that allowed defendant a fair opportunity to prepare his case. In United States v. Baum, 482 F.2d. 1325 (2d Cir. 1973), the court held that the defendant had been denied a fair trial by the governments withholding of evidence that the defendant had committed a similar crime in the past. Noting that the evidence would have been admissible under rule 404(b), and 403, the court nevertheless held that "the effect of the evidence was such as to require that the defense be given a fair opportunity to meet it." Id. at 1331. In United States v. Scanland, 495 F.2d 1104 (5th Cir. 1974) and United States v. Jackson, 621 F.2d 216 (5th Cir. 1980), convictions were

reversed because of the government's failure to abide by its promise not to introduce similar acts.

In short, the fact that an instruction was given regarding the limited use of similar act evidence does not lessen the impropriety of introducing previously undisclosed similar act evidence to rebut defense counsel's opening statements in this case. The government candidly admitted that it had not given notice of intent to use similar acts in response to defendants' Rule 16 discovery motions and had specifically stated on the record that it did not intend to use any similar acts. It asserted, rather, that it was only because the defense had brought the matter up that the similar acts were offered. This assertion, however, cannot pass muster, since the government had to

know that Hunt and Welsh would contend that the failure of the Ranger project was a product of unforseen circumstances and business conditions; they could scarcely have defended otherwise, since it was undeniable that they participated in the Ranger project and that no coal was ever mined for Ranger.

The government's withholding of its similar act contentions until after the trial had begun was also particularly prejudicial because of its misleading effect on the court and the parties in connection with the joinder of defendants. The matters raised on cross-examination by hostile co-defendant Cline (see App. p. 1729) seeking to exculpate himself by proving wrongdoing on the part of Hunt and Welsh raises joinder issues which could have been avoided by pretrial severance, but which

instead operated to deprive Hunt and Welsh of a fair trial. See, eg. United States v. Romanello, 726 F.2d 173 (5th Cir. 1984) (antagonistic defenses denied defendants fair trial). Similarly, defendant Welsh was prejudiced by being joined together with Hunt in a trial in which the government disclaimed an intent to use similar act evidence, but later demonstrated to the jury that one of the defendants was involved in other dishonest acts, in which his counsel appeared to be an active participant.

1. Antares IV and Attorney Eacret

As stated previously, the Fourth Circuit found that Antares was part of the government's similar act evidence. As contended by United States Attorney Rich: "Just like Ranger, just like Hilltop, Antares is a sham." (App. p.

4140) But the important fact about Antares as it was presented to the jury was the fact that Hunt's attorney, Donald Eacret, was a participant in what the government portrayed to be a thoroughly shady deal.

The introduction of attorney Eacret into the cast of characters took place during the testimony of Michael Norris, whose stormy relationship with defendant Hunt was an important issue in the case. In direct examination, the government attempted to introduce evidence regarding the Antares syndication, which came into being on December 31, 1976, and to establish that the general partner of Antares was Hunt's attorney, Donald Eacret. Although the court initially rebuffed this effort to identify Mr. Eacret as a participant in any of the transactions in issue, (App. p. 2674) his

involvement soon became evident. Following cross-examination the government established, over objection, that Norris had traveled to New Orleans with Mr. Eacret the previous week to look at investments in synthetic fuels. Acting United States Attorney Rich continued the questioning, over repeated objections, to establish that defendant Hunt was also involved in the new project but did not want to be general partner because of a civil lawsuit pending against him, and that the general partner would therefore be Don Eacret. (App. p. 2938-2940)

The activities of Mr. Eacret became the subject of jury attention in connection with the Antares transaction during the defense stage of the trial. Cross examining Larry Hunt, who testified

in his own defense, Assistant United States Attorney Nicastro adduced the following testimony:

> Q Isn't it a fact, Mr. Hunt, that you negotiated the Antares deal on an airplane, in part on an airplane between Michigan and Ohio in the late night hours of December 31, 1976?
>
> A No, that's not a fact. I thought the deal was negotiated on the phone between either Mr. Bownas or Mr. Fromson and somebody in Michigan, and the only person -- well, there was only one person I even knew when I got to Michigan that was even there, and he wasn't a negotiator as to what was going on.
>
> Q Isn't it a fact, Mr. Hunt, that certain of the closing documents were completed on an airplane, were worked on on an airplane between Michigan and Columbus in the late night hours of December 31, 1976?
>
> A I'm not saying it's impossible. I don't recall that. I thought the deal was finished when we left Michigan, but if there was something else to sign -- I know there was nothing else to negotiate, but if there was something else to sign, it's possible, but I don't recall it. If it was done that way.

> Q Isn't it a fact that you flew back from Michigan to Columbus, Ohio, with the general partner of Antares IV Limited?
> A I think so, yes.
> Q Who was that general partner?
> Q Who was the general partner of Antares IV Limited that you flew back from Michigan to Columbus with?
> A The attorney that's defending me, Donald Eacret.

(App. p. 4229-4230). (Emphasis supplied).

The defendants' motions for mistrial were denied.

The government did not miss the opportunity to discredit attorney Eacret as a collaborator of Hunt. For example, United States Attorney Rich talked about Eacret in closing argument as follows:

> Ladies and gentlemen, just a few more things, comments. When you look at these actions, we look at the years '76, '77, '78 and we see a pattern. On November 26, '76 Chilton was closed. These three fellows

and a half million dollars in cash and we know that from the various checks distributed, $998,000, I submit the evidence will show that they went hog wild then, easy money. The next month Ranger, 1.86 million. The same night, Antares, $260,000. June '77, Hilltop, $175,000. Why bother mining any coal. Sure you make money mining coal but this is a lot easier. You can drive around in a lease car. Larry Hunt had a porche. That would do him a lot of good trying to drive to the Grassy Creek mine and Ranger mine.

Nineteen hundred and seventy-eight, L. H. Hunt Enterprises, remember, that is the organization that owns this. Three deals by Larry Hunt in December of '77. Remember how much cash from Dr. Master's testimony. All coal tax shelters 2.4 million dollars in cash. Six months later all gone. Only two of the three mines ever opened and the total production of them several thousand tons or 2.4 million dollars, Larry Hunt is a master promoter and what happened in 1980? He switches from coal to synthetic fuels. And who does he pick up as a partner or an associate? Don Eacret and Mike Norris.

> The verdict is still out on 1981.

(App. p. 5074-77).

Notice of intent to portray Antares as a sham transaction, and to portray attorney Don Eacret as a collaborator should have been given, for it surely could have prevented this unseemly situation. It would have communicated to the court the fact that Eacret had a different conflict of interest than the one described by the government. Although government attorney asserted in pretrial hearings that Eacret might have a conflict of interest because of a possible obligation, as general partner of Antares to pursue civil claims against Hunt or Midwest, it was never suggested that he would be accused of criminal conduct. (App. p. 154-156). This was a

matter that should have been brought to the attention of all concerned prior to trial.

B. References to Unavailable Government Witnesses

Perhaps the most egregious and prejudicial of the errors raised in this case was the communication to the jury that the government had other evidence of other misconduct which was not presented in evidence. This communication came in the context of references to two allegedly unavailable witnesses, whose testimony, the jury was told, would have contributed similar act evidence against defendant Hunt.

The government, through its references to attorney Eacret in the evidence, repeatly suggested that Attorney Eacret was a collaborator in the Antares syndication. The court's

rationale for admitting evidence concerning Eacret was told to the jury in an instruction apparently designed to be curative: The purpose of the evidence regarding the latest "deal" with Norris and Hunt was "for the single purpose of undertaking to show, if you find that it does, that Eacret and the witness Norris were not strangers prior to Eacret's examination of him at this trial on behalf of his client, the defendant Hunt". Regarding the Antares matter, the court instructed that the evidence was received "for the single purpose of indicating at most, if at all, that the government may not enjoy the same freedom of access to Mr. Eacret as a witness in this case as it might have to other general partners who testified at this

trial, such as Paul Friedberg, who was general partner of the Chilton-Grassy Creek project." (App. p. 5316-17).

The substance of this remark is that the government had other similar act evidence which it could not adduce because Mr. Eacret was Hunt's counsel and therefore unavailable as a witness. It should be noted that this statement was incorrect, since the government could certainly have used Eacret as a witness, and the court made special arrangements to assure that attorney Rudolph L. DiTrapano would be available if Eacret was called to the stand. (App. p. 181). More importantly, in suggesting that the government may have had less access to Eacret as the general partner of Antares because of his role as Hunt's attorney, and by comparing him with Paul Friedberg, whose testimony was vehemently adverse to

Hunt on another similar act, the court told the jury in effect that if he could testify, Eacret would have imparted information which was damaging to Hunt. The simple suggestion that he was not available to the government as a witness in itself suggests that his testimony would have been useful against the defendants. But the comparison to Paul Friedberg, the government's devastating rebuttal witness, left no uncertainty as to the import of the Court's remark. Finally, the insertion of Eacret into the Antares matter and the courts explanation to the jury created an inference that Eacret had knowledge of improper dealings and was covering for Hunt by withholding evidence--an inference that was reinforced by the evidence that Eacret was to be the general partner in Hunt's stead in a synthetic fuels venture,

suggesting that the Eacret was willing to insulate Hunt, who would have been the general partner but for a civil suit against him.

These suggestions by the court and the government were clear error. It is inappropriate to imply that evidence supporting the government exists but has not been introduced at trial. United States v. Scalia, 464 F.2d 1301 (3d Cir. 1972) cert. denied 410 U.S. 933 (1973); Brooks v. Francis, 716 F.2d 780, 787 (11th Cir. 1983). Nor is it permissible to engage in attacks on the conduct of defense counsel; United States v. Dorr, 636 F.2d 117 (3d Cir. 1981); United States v. Rios, 611 F.2d 1335, 1342 (10th Cir 1979).

1. The Absent "Red Jacket" Witness

The second instance in which the jury was informed that the government had additional evidence of guilt was more explicit. This occurred in connection with Mr. Hunt's involvement with the Red Jacket Coal Company prior to the inception of the Grassy Creek Mine. The government, in cross examination of defendant Hunt, attempted to establish that he had been fired from Red Jacket for misconduct. Hunt denied the accusation, but the government presented no rebuttal witnesses to establish that the misconduct had in fact occurred. Attorney Eacret attempted to address this on closing argument, arguing that the government had produced no evidence of the wrongdoing, but was interrupted by government attorney Rich:

[MR. EACRET]: Then when that seemed to go no where, they started asking questions about Red Jacket. He said, 'Mr. Hunt, were you fired from Red Jacket?' He said, 'No.' They said, 'Mr. Hunt, isn't it true that Red Jacket lost 1.5 million dollars in the first year of operation?' He said, 'No.' They said, 'Mr. Hunt, isn't it true that you were shipping mud and waster while you were working at Red Jacket to National Mines?' He said, 'No.'

Did you hear any witness, any evidence, any testimony whatsoever about anybody coming in and saying anything different that Mr. Hunt said on the stand? No, another red herring.

MR. RICH: I apologize. I ask the court to instruct the jury that the witness had an detached retina and could not come and testify.

MR. EACRET: That was not a reason, Your Honor, the man could not drive.

THE COURT: Could you make you statement on the record, Mr. Rich?

MR. RICH: Your Honor, I state for the record the reason that witness wasn't called was because he had an operation for

> a detached retina and the doctor would not let him travel from Florida to Charleston.

(App. p. 5090-93).

The statement by United States Attorney Rich explaining to the jury the absence of any witness on the Red Jacket matter was clearly improper. It is well settled in that the prosecution's argument may not allude to facts not in evidence, or use closing argument as an opportunity to testify. United States v. Stanley, 455 F.2d 644 (4th Cir 1972); see generally, United States v. Ainesworth, 716 F.2d 769, 774 (10th Cir 1983). In United States v. Fredericks, 586 F.2d 470 (5th Cir. 1978), cert. denied 440 U.S. 962 (1979), for example, the prosecution responded to the defense counsel's legitimate argument regarding the government's failure to produce

certain witnesses by informing the jury, "when his turn came", that the witness in question was in jail. The court found that the prosecutor's explanation of the nonappearance, unsupported by evidence, was error. Similarly, in United States v. Latimer, 511 F.2d 498 (5th Cir 1975), the court held that the prosecution had "violated two fundamental rules" in telling the jury, in response to the defendant's argument, that the government was unable to show films of the alleged bank robbery because the camera system had malfunctioned. Accordingly, the conviction was reversed, the court explaining: "First, the argument went outside the record as to facts not proven... . Second, the statement put the personal knowledge and belief of the prosecuting attorney on the scales, which was also clearly improper." Id. at 503.

The Court of Appeals treatment of the two incidents in this case did not address the fact that these communications to the jury placed the defendant in a position where he was completely unable to cross-examine or defend against the accusation. As to the Antares matter, the Fourth Circuit apparently approved as a curative instruction the suggestion that Eacret would have been a good witness for the government, but for his unavailability. (App. I at 11 n.4). The appeals court did address the references to the absent witness on the Red Jacket matter, but merely characterized it as the "unenlightened sparring of counsel." Id. at 12. This attempt to minimize the prosecutors conduct ignores the fact that that the prosecutor was not simply being "mean minded", impolite and disruptive;

he was telling the jury that the government could show wrongdoing on the part of Mr. Hunt completely unsupported by the evidence.[4]

In a recent opinion from the Eleventh Circuit, Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983), the court discussed at length the constitutional interests at stake when the government resorts to testimony not advanced at trial. There the state court had allowed the investigating officers to testify that as part of their investigation they had met with an unidentified young man.

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[4] The improper statement in the present case takes on a more serious aspect, moreover, when viewed in the context of the government's repeated attacks on Eacret's credibility. Attorney Eacret had every right to argue any inference from the evidence or lack of evidence. Yet the government's remark, interrupting Eacret's argument, gave the jury the impression that Eacret had been caught improperly attempting to mislead the jury.

In closing argument, the prosecutor then made reference to the unidentified informant as an eyewitness to the crime who would not testify. Upholding a writ of habeas corpus, the court found that the testimony and argument had violated the confrontation clause and denied the accused a fair trial.

> [I]n closing argument the prosecutor could no longer withstand the temptation to spell out for the jury the existence of this anonymous informant. In doing so, the prosecutor, in essence, informed the jury that there existed an eyewitness to this crime who accompanied the police to the residence of the defendant, but who refused to testify out of fear of retribution. This situation was aptly described by the prosecutor as 'a problem for everybody.' Indeed, this court agrees that it is a problem of monumental concern when there is a witness who could assist the jury in its truthfinding process, but is afraid to testify. Reference to such a witness's statements, however, is inadmissible under the

constitution. Here, the prosecutor gave in to the temptation to provide for the jury this inadmissible evidence. This violated the defendant's right to confront the anonymous, non-testifying witness. The prosecutor violated the defendant's rights when he explained to the jury that this anonymous informant was afraid to testify, but that it was clear he was an eyewitness to the crime who had identified to the officers, the defendant as the perpetrator.

The sixth amendment right of an accused to confront the witnesses against him or her is a fundamental right. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Although we do not doubt the existence of this informant, he was never present, nor did he testify at the trial. The purpose of a defendant's right to confront a witness who testifies against him or her is not only to allow the defendant a chance at cross-examination, but to allow the jury to observe, and judge the credibility of the witnesses. The Supreme Court summarized the importance of the confrontation clause when it stated:

> The mission of the Confrontation Clause is to advance practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'

Dutton, 400 U.S. at 89, 91 S.Ct. at 220, quoting California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1969).

* * *

It is also a fundamental principle of trial practice that a prosecutor may not seek to obtain a conviction by presenting to the jury any evidence outside of the record. United States v. Vera, 701 F.2d 1349 (11th Cir.1983). The prosecutor clearly went outside the record of this case when he explained to the jury that there was an eyewitness informant who told the police that Hutchins was the perpetrator of the crime. The trial court concluded, and we agree, that the prosecutor's reliance on the hearsay testimony in closing argument

> was such that a reasonable juror could have concluded only that the informant identified Hutchins as the perpetrator of the robbery. The use of this testimony in closing argument and the easily drawn inferences thereform, constituted hearsay and violated the confrontation clause, thereby denying Hutchins a fair trial. See Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); see also Favre v. Henderson, 464 F.2d 359, 362 (5th Cir.), cert. denied, 409 U.S. 942, 93 S.Ct. 235, 34 L.Ed.2d 193 (1972).

Id. at 515-17.

The Fourth Circuit has committed an error of constitutional dimension in minimizing this misconduct on the part of the government and its prejudicial effect on both of the defendants.

C. The Government's Voucher of Credibility

The final stroke in the government's resort to improper matters came, as in the previous instance, at the invitation

of the court. Following the closing arguments of the defendants, United States Attorney Rich asked the court for permission to argue out of turn to respond personally to the suggestion, made by trial counsel for defendant Welsh, that successful businesses are not prosecuted. Permission was granted, over objection, and Mr. Rich then took the opportunity to make the following statement:

> Ladies and gentlemen, Barbara is going to make our response to the argument of defense counsel. I asked the judge if I could have just a couple of minutes to respond to Mr. Copelands statements and implications yesterday and I feel that I should respond because I am the United States Attorney and I don't think that I should pass that off on Barbara.
>
> Mr. Copeland implied that persons and businesses which are successful are not prosecuted, successful in the

> business sense as distinguished from the criminal sense. That isn't true.
>
> If the walls in this courtroom could talk, who have seen the defendants that come in this courthouse prosecuted by this office, they would tell you that is not the truth.
>
> I took an oath when I became acting United States Attorney. I took an oath when I became Assistent United States Attorney ten years ago sunday, and that oath said under God that I would follow the constitution and I would enforce the laws of this country fairly, and that's been done, and its been done in this case, and you can be confident of that.

(App. p. 5231-32).

By granting attorney Rich the opportunity to interrupt the order of argument twice, the court effectively told the jury that it was urgently necessary for Mr. Rich to correct deliberate false impressions created by defense counsel. Rich then vouched his

own credibility, affirmed his oath, and asserted that he had enforced the laws fairly "in this case". The argument, of course, was improper. The prosecutor has a well-established duty to avoid "improper suggestions, insinuations, and especially assertions of personal knowledge." Berger v. United States, 297 U.S. 78 (1932). In this case the government violated this rule both by vouching the credibility of his office, and by bolstering the government's case with matters outside the record. See United States v. Roberts, 618 F.2d 530 (9th Cir. 1980), appeal after remand 640 F.2d 225 (1981) cert. denied 452 U.S. 942. A prosecutor may not "invoke the sanction of his personal status or the sanction of the government itself as a basis for conviction", United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979)

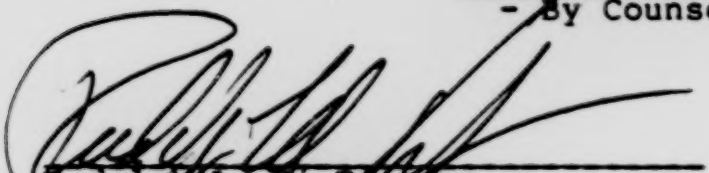
(comments held "plain error"), or "place his own credibility before the jury". United States v. Dawkins, 562 F.2d 567, 569 (8th Cir. 1977), and the court perhaps recognized this with a mild follow-up instruction. But the combined effect of this government's attorney and the discrediting, at the court's invitation, of the credibility of the attorneys for Hunt and Welsh must necessarily have been prejudicial in a close case where the jury struggled for days to arrive at confusing and inconsistent verdicts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the

United States Court of Appeals for the Fourth Circuit should be granted.

LARRY H. HUNT, and
PAUL J. WELSH, II,
Defendants
- By Counsel -



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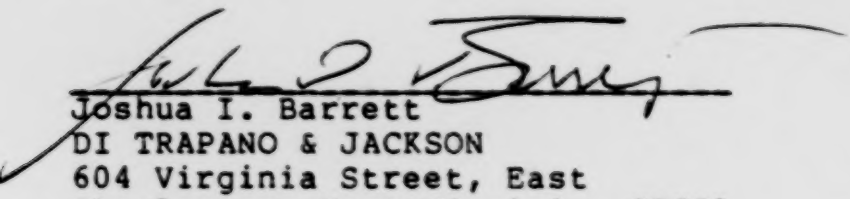

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